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In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONER

v.

ALISON PALMER, ET AL.

GEORGE P. SHULTZ, SECRETARY OF STATE, PETITIONER

v.

MARGUERITE COOPER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), which makes the United States liable for attorneys' fees "the same as a private person," waives the government's sovereign immunity so as to permit the calculation of an attorney's fee award against the United States on the basis of the attorney's current rates (rather than the "historic" rates charged at the time the work at issue was performed) to compensate the attorney for delay in receipt of payment.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, named respondents are A. Ellen Shippy, Mary Lee Garrison, Mary C. Finrow, Laurel M. Cooper, Mary Hartman, Mary A. Ryan and JulieAnn McGrath. These respondents represent a certified class composed of women who unsuccessfully applied between 1976 and 1983 to become Foreign Service Officers through the Department of State's Junior Officer Program, who were not subsequently hired as Foreign Service Officers, and who did not also apply to become Foreign Service Officers through mid-level, lateral entry, or reappointment programs.

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MARGUERITE COOPER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of State, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these consolidated cases.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a), and the memorandum and order of the district court (App., *infra*, 18a-19a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1985. On May 8, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to June 27, 1985. On June 21, 1985, the Chief Justice further extended the time for filing the petition through July 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

1. In 1976 respondents brought these consolidated actions against the Department of State under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that the Department had discriminated on the basis of sex in the hiring and treatment of Foreign Service officers. The merits of the actions were settled in part in October 1983, when the United States District Court for the District of

Columbia approved a consent decree providing relief for female junior-level Foreign Service applicants. App., *infra*, 24a-25a.

Respondents then sought attorneys' fees under the Title VII fees provision, 42 U.S.C. Section 2000e-5 (k), which states that "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs, and * * * the United States shall be liable for costs the same as a private person." In making this request, respondents maintained that the fee should be calculated on the basis of their attorneys' current, rather than their "historic," rates (see App., *infra*, 32a).[1] The government opposed this method of fee calculation, maintaining that the use of current rates was equivalent to an award of interest against the United States, which is improper in the absence of a waiver of sovereign immunity (*ibid.*).[2]

On September 17, 1984, the district court rejected the government's contention. Relying on *Murray* v. *Weinberger*, 741 F.2d 1423 (D.C. Cir. 1984), the court held that Section 2000e-5(k) "is a statutory waiver of sovereign immunity" (App., *infra*, 33a) in "the current rates context" (*id.* at 33a n.5). The court reasoned that private defendants may be required to compensate the attorneys for prevailing Title VII plaintiffs at current rates, and noted that the statute generally measures the government's lia-

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[1] That is, the attorneys would be compensated for each hour billed during the course of the litigation at current rates, rather than at the rate actually charged by the attorneys at the time that the given hour of work was performed (see App., *infra*, 32a).

[2] The government also challenged the "prevailing market rate" proposed by respondents and certain claims for expenses (see App., *infra*, 26a), issues that are not in controversy here.

bility against that of private defendants. The district court therefore concluded that a fee applicant "may calculate the lodestar according to current rates, or she may rely upon historical rates and seek an adjustment for 'delay in payment'" (*ibid.*). The court accordingly based its fee award for respondents' attorneys on 1984 rates (App., *infra*, 32a-33a).[3]

On November 7, 1984, the district court issued two interim orders intended to implement its earlier attorneys' fee decision. The first (App., *infra*, 20a-21a) directed the government to pay the undisputed portion of the fees and costs (based on respondents' attorneys' historic billing rates) within 14 days; the second ordered the government to pay "the difference between the uncontested amount (based on the historical hourly rates of [respondents'] counsel when the work was performed) and the amount of fees as calculated based on the use of hourly rates in effect when the Fee Application was filed" (*id.* at 19a).

On the government's appeal, the court of appeals summarily affirmed the order mandating payment at current rates (App., *infra*, 1a-2a).[4] In its order, the court of appeals explained only that "the correctness of the district court judgments" is "demonstrate[d]" by *Shaw* v. *Library of Congress*, 747 F.2d 1469 (D.C.

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[3] The 1984 rates relied upon by the district court were hypothetical "prevailing community rates," rather than the attorneys' actual 1984 rates. This method of calculation was successfully challenged by the government on a motion for reconsideration. See note 5, *infra*.

[4] The court of appeals also affirmed the first district court order directing immediate payment of the uncontested portion of the fees (App., *infra*, 2a). That portion of the fees has now been paid, and the validity of this first district court order is not in issue here.

Cir. 1984), petition for cert. pending, No. 85-54, which held that Section 2000e-5(k) waived the sovereign immunity of the United States as to awards of interest (App., *infra*, 2a).[5]

REASONS FOR GRANTING THE PETITION

The issue in this case is closely related to the question presented in the pending petition for certiorari in *Library of Congress* v. *Shaw*, No. 85-54: whether 42 U.S.C. 2000e-5(k) is a waiver of the government's traditional immunity against awards of in-

[5] On December 21, 1984, the district court, on the government's motion, reconsidered the portion of its original decision (App., *infra*, 26a-34a) calculating the lodestar on the basis of "prevailing community rates." The court explained that, under *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, No. 84-1655 (June 17, 1985), fees generally should be based on an attorney's actual billing rates, rather than on a hypothetical prevailing rate. The district court accordingly recalculated the lodestar on the basis of respondents' attorneys' actual (current) rates: $80 per hour for partners and $65 per hour for associates (which substituted for the court's original fee schedule of $75 per hour for the most junior associates and $150 per hour for the most senior partner (App., *infra*, 27a)). *Id.* at 11a. While this adjustment resulted in a substantial reduction in the size of the lodestar, the district court proceeded to readjust the new lodestar upward by 54.75% "[i]n view of [respondents' attorneys'] superior services and exceptional success" (*id.* at 12a). The court also reaffirmed its September 17, 1984 conclusion (see *id.* at 34a-42a) that the attorneys were entitled to a 20% "contingency adjustment" (*id.* at 14a). The government's challenge to the propriety of these adjustments currently is pending on appeal. Because the court of appeals—in the order that is the subject of this petition—already has determined that the fee may be based on current rates, however, the pending appeal can have no effect on the issue here; the government accordingly will have no opportunity to challenge the use of current rates in this case if it fails to do so now.

terest. We submit in our *Shaw* petition (at 6-17) that the court of appeals' attempt to find such a waiver in the statute cannot be reconciled with the traditional "no-interest rule" long propounded by this Court, which provides that Congress should not be deemed to have permitted interest to run on a substantive recovery against the United States unless it affirmatively desired that result and announced its intention in unambiguous terms.

1. As the District of Columbia Circuit now acknowledges, the propriety of using current rates in calculating an award of Title VII attorneys' fees against the government turns on whether Section 2000e-5(k) waives the "no-interest rule." The court of appeals explained in *Shaw* that there is no difference, for sovereign immunity purposes, between pure interest and the use of current rates (or any other delay adjustment to the lodestar): "[a]ddition of a delay factor to the lodestar serves only to compensate the attorney for loss of the use of earned money from the time of rendition of services to the time of the receipt of the fee," and therefore functions as "compensation for the use, forbearance or detention of money—the common understanding of interest." 747 F.2d at 1474 n.41 (*Shaw* Pet. App. 12a n.41). For this reason, the court declared that it would "feel constrained to treat [such a delay adjustment] as interest for purposes of the sovereign-immunity rule" (*ibid.*). This view of the issue was reaffirmed in the decision below, which relied on *Shaw*—a case involving interest—in affirming the district court's use of current rates.

Although we disagree with the court of appeals' holding that Congress effected a waiver of sovereign immunity as to interest in Section 2000e-5(k), the court's conclusion that interest and current rate ad-

justments must receive the same treatment for sovereign immunity purposes plainly is correct. The "no-interest rule" is not directed solely at monetary awards expressly denominated as interest; because the doctrine is based on the proposition that "delay or default cannot be attributed to the government" (*United States* v. *Sherman*, 98 U.S. 565, 568 (1878)), it uniformly has been applied to prevent plaintiffs from holding the United States liable, absent its explicit consent, on claims grounded on "the belated receipt" of funds. *Saunders* v. *Claytor*, 629 F.2d 596, 598 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981). The courts accordingly have barred claims of all sorts arising out of the delayed payment of substantive recoveries by the United States, whether termed "inflation adjustments" (*Blake* v. *Califano*, 626 F.2d 891, 895 (D.C. Cir. 1980); *Saunders*, 629 F.2d at 598), "compensation for use" (*United States* v. *North American Transportation & Trading Co.*, 253 U.S. 330, 337-338 (1920)), or something equally euphemistic. See generally *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976); *United States* v. *Delaware Tribe of Indians*, 427 F.2d 1218, 1222-1224 (Ct. Cl. 1970).

While there are technical differences between interest and an upward adjustment of the lodestar through the use of current rates,[6] the latter type of

[6] In contrast to a flat interest rate applied retrospectively, for example, current rates may more clearly take account of inflationary changes that occurred while payment was pending. Cf. *Blake*, 626 F.2d at 895 & n.9. At the same time, however, a law firm's rates may be affected by a wide range of factors wholly unrelated to the passage of time, such as changes in the firm's reputation, experience, or expenses.

adjustment is expressly designed to compensate "the eventual recipient [for] the value of the use of the money in the meantime" (*Copeland* v. *Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc); see *id.* at 893 n.23), or to "approximate the value today of the historic rates charged at the time when the legal services actually were rendered." *Murray*, 741 F.2d at 1433. See *National Ass'n of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1328 (D.C. Cir. 1982); *EDF* v. *EPA*, 672 F.2d 42, 59-60 (D.C. Cir. 1982). Use of current rates, in other words, is nothing more than an "adjustment[] for delay in payment" (*Murray*, 741 F.2d at 1433), and it was viewed as such by the district court in this case (App., *infra*, 33a n.5). Because the applicability of the "no-interest rule" therefore should determine the outcome here, it would be appropriate for the Court to hold this case pending disposition of the petition for a writ of certiorari in *Shaw*.

2. Having said this, we note that there is some authority in the District of Columbia Circuit for the proposition that the use of current rates may not run afoul of the "no-interest rule," even in the absence of a waiver of sovereign immunity as to interest. Several pre-*Shaw* decisions approved the use of current rates or "delay adjustments" in fee litigation against the government without mentioning sovereign immunity (*Copeland*, 641 F.2d at 893 & n.23; *Concerned Veterans*, 675 F.2d at 1328; cf. *EDF* v. *EPA*, 672 F.2d at 59-60 (approving delay adjustment in litigation under the Toxic Substances Control Act));

Even if Congress in Section 2000e-5(k) has waived sovereign immunity as to awards of interest, then, it is far from clear that use of a current rate adjustment ever would be an appropriate substitute for interest.

one other decision expressly stated that the "no-interest rule" would be inapplicable to a request for current rates, although the court did not explain whether it reached that conclusion because it found a waiver of the rule in Section 2000e-5(k) or because it believed a waiver to be unnecessary. *Murray*, 741 F.2d at 1432.[7] And Judge Ginsburg, dissenting in *Shaw*, explicitly suggested that the difference between interest and a delay factor "can be more than semantic." 747 F.2d at 1485 (*Shaw* Pet. App. 38a). Judge Ginsburg explained that a delay factor, in contrast to retrospectively calculated interest, "may figure as a contingency adjustment, applied prospectively to the lodestar. Just as an attorney setting an hourly rate in a contingent fee case may factor in the risk that the cause may not prevail, so too an attorney embarking on services for which he or she anticipates payment ultimately, but not promptly, may factor in the expected delay." *Ibid.* (*Shaw* Pet. App. 38a-39a).[8]

In our view, any proposed distinction for sovereign immunity purposes between interest and the use of current rates cannot withstand scrutiny. The sug-

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[7] In holding that current rates may be used to compensate for delay, *Murray* relied on the authority of *Copeland* (see 741 F.2d at 1432); *Copeland*, in turn, had relied on a decision involving antitrust claims against a private defendant. 641 F.2d at 893, citing *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976).

[8] In drawing this distinction Judge Ginsburg believed herself bound by *Murray*, which had upheld the use of current rates or a delay adjustment. *Shaw*, 747 F.2d at 1486 (*Shaw* Pet. App. 40a-41a).

gestion that current rates substitute for what should have been a prospectively applied delay factor is, in this context, wholly fictional, "for an award under a fee-shifting statute benefiting only a party prevailing in litigation can never be made prospectively." *Shaw*, 747 F.2d at 1474 n.41 (*Shaw* Pet. App. 42a n.41). Because the rate used in calculation of the lodestar is chosen at the completion of the litigation, allowing the addition of a delay factor (or the use of current rates) simply amounts to a decision that the attorney is entitled to obtain compensation for delay attributed to the United States.

In any event, the method used to derive the delay adjustment—whether it is taken directly from the prevailing interest rate, or from the inflation rate, or from some rougher "prospective" estimate of the likely delay in obtaining reimbursement under a fee-shifting statute—is not determinative for purposes of the "no-interest rule"; "it is the *reason* why the fee is adjusted upward that is vital." *Shaw*, 747 F.2d at 1474 n.41 (emphasis in original) (*Shaw* Pet. App. 12a n.41). Because current rates are used solely to adjust for delay, basing the lodestar on such rates is improper. Given the confusion in the lower courts on this point, however, the Court may find it appropriate to grant plenary review in this case if it does so in *Shaw*, in order to fully settle this area of the law.

CONCLUSION

The petition for a writ of certiorari should be held for disposition in light of *Library of Congress* v. *Shaw*, petition for cert. pending, No. 85-54 . In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 76-01439

Civil Action No. 76-02006

No. 84-5815

ALISON PALMER, ET AL.

v.

GEORGE P. SHULTZ, as SECRETARY
OF STATE, APPELLANT

And Consolidated Case No. 84-5816

[Filed Feb. 11, 1985]

ORDER

Before: EDWARDS, GINSBURG and SCALIA, Circuit Judges

Upon consideration of appellees' motion for summary affirmance, the response, the correction to the response, and the reply, it is

ORDERED by the court that the motion for summary affirmance is granted in part, with regard to the judgments entered by the district court and appealed herein, and those judgments are affirmed. The merits of the appeals are so clear as to make summary affirmance proper. *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980); *see United States v. Glover*, 731 F.2d 41 (D.C. Cir. 1984). Concerning the specific points raised by appellant, the court notes that there is no mention in *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981) (per curiam), of appeal of any issue but the award of attorneys' fees, that the suggestion of rehearing *en banc* in *Shaw v. Library of Congress*, 747 F.2d 1469 (D.C. Cir. 1984) has been denied, and that the principle of judicial economy was not found to warrant delay of the attorneys' fees award summarily affirmed in *Parker*, 670 F.2d at 250. *Parker* and *Shaw* demonstrate the correctness of the district court judgments. The amount due and owing under these judgments shall be paid immediately. It is

FURTHER ORDERED by the court that the case is remanded in part, solely for the purpose of allowing the district court to rule on the award of post-judgment interest requested by the appellees. The parties have not adequately briefed this issue. *See Glover*, 731 F.2d at 45. It is

FURTHER ORDERED by the court, on its own motion, that the Clerk shall withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. D.C. Cir. R. 14.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Jan. 23, 1985]

MEMORANDUM AND ORDER

This matter is presently before the Court on plaintiffs' motion for reconsideration of this Court's December 21, 1984 Memorandum Opinion (Mem. Op.) granting, pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), plaintiffs fees and costs in the amount of $405,469.46. In their motion plaintiffs request that the upward adjustment for quality of representation used in calculating the merits lodestar be similarly applied to

the fee litigation lodestar. Upon careful review of the record, plaintiffs' motion is denied.

In applying the upward adjustment to the merits lodestar, the Court was guided by the Supreme Court's statement in *Blum v. Stenson*, 104 S.Ct. 1541, 1549 (1984), that quality of representation "may justify an upward adjustment only in the rare case when the fee applicant offers specific evidence to show the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and the success was 'exceptional'." The Court found that this was one of those "rare cases" referred to in *Blum*, and that plaintiffs had rendered "superior services" and achieved "exceptional success." Mem. Op. at 6-7. These findings did not encompass plaintiffs' achievement of an award of attorney' fees.

The plain language used in *Blum* suggests that the criteria of "superior service" and "exceptional success" relate to an upward adjustment solely to the merits portion of the litigation. Such an interpretation of *Blum* itself would be enough to preclude any adjustment to the fee litigation lodestar. In addition, to the extent the above criteria can be applied to the fee litigation lodestar, an upward adjustment is denied because the success obtained in winning an award of attorney's fees is far from exceptional.

The Court concludes that an upward adjustment for quality of representation was not meant to apply to the fee litigation. Accordingly, it is by the Court this 23rd day of January, 1985

ORDERED that plaintiffs' motion for reconsideration is denied.

/s/ John Lewis Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Jan. 23, 1985]

ORDER

Upon consideration of defendant's motion requesting that the Court's December 21, 1984 memorandum and order be entered as a final judgment, plaintiffs' lack of opposition thereto, and it appearing that there is no just reason for delay in entering such a final judgment, it is by the Court this 23rd day of January 1985,

ORDERED that defendant's motion is hereby granted, and it is

FURTHER ORDERED that this Court's December 21, 1984 memorandum and order is hereby designated a final judgment, pursuant to Federal Rule of Civil Procedure 54 (b), on the issue of plaintiffs' application for an award of attorneys' fees and expenses.

/s/ John Lewis Smith, Jr.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Dec. 21, 1984]

MEMORANDUM

This matter is presently before the Court on defendant's motion for reconsideration of this Court's September 17, 1984 Memorandum Opinion granting, pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), plaintiffs fees and costs in the amount of $439,541.48. The government moves for reconsideration in light of the Court of Appeals decision in *Laffey* v. *Northwest Airlines,*

Inc., No. 83-1838 (D.C. Cir. Sept. 28, 1984), which delineates the standards to be used in calculating attorney's fees awards to "for-profit" firms. Upon careful review of the record, and of recent developments in the law, the defendant's motion for reconsideration is granted and plaintiffs are awarded $147,807.25.

In the September 17 Memorandum Opinion (Mem. Op.), this Court properly determined that "[t]he initial task in determining an appropriate fee award . . . is to establish the 'lodestar': the number of hours expended multiplied by a reasonable hourly rate." Mem. Op. p. 3, quoting *National Association of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1323 (D.C. Cir. 1982) (citing *Copeland* v. *Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (*en banc*) ("*Copeland III*")). As there was no dispute as to the "number of hours expended" by plaintiffs, Mem. Op. pp. 3-4, the Court was left to calculate a "reasonable hourly rate." This Court examined the actual rates charged by plaintiffs but concluded that the "market value" of counsels' services was more accurately reflected in "prevailing community rates." The Court found that plaintiffs' proposed rate schedule "was consistent with 'prevailing community rates' and appropriate for use in calculating the lodestar." Mem. Op. p. 9. The Court rejected the government's argument that the use of current rates represented a claim for interest barred by sovereign immunity, instead finding that section 706(k) is a statutory waiver of sovereign immunity. Mem. Op. p. 10. In addition, the Court, finding that the facts of this particular application met the criteria established by *Blum* v. *Stenson*, 104 S.Ct. 1541 (1984), and *Murray* v. *Weinberger*, No. 83-1680 (D.C. Cir. August 24,

1984), ordered that the merits lodestar be adjusted upward by 20% to reflect the uncertainty that existed at the commencement of the suit, the so-called contingency multiplier. All told, this Court awarded plaintiffs $439,541.48, which included a fee litigation lodestar of $63,901.25, a final merits award of $337,669.20, and $37,971.03 as reimbursement for reasonable litigation expenses.

The relevant portions of the *Laffey* decision concern the hourly rate component of the lodestar calculation. The Court of Appeals drew a distinction between nonprofit and for-profit firms, holding that a private firm's customary hourly rate, not the rates charged by other attorneys in the community, should be used in calculating a lodestar fee for a prevailing party under a fee-shifting statute. *Laffey*, slip op. at 54. The Circuit Court was concerned with avoiding "a second major litigation" that often accompanies a court's "essentially impossible task of selecting one rate over another from a wide range of 'market' rates." *Id.* at 28. The Court of Appeals recognized that while the "prevailing market rate" may be "a necessary evil" when a nonprofit firm is involved, it can be dispensed with where a private, for-profit law firm has established market rates for similar services.

Before dealing with the merits, the Court must first address plaintiffs' procedural objection to the motion. Plaintiffs assert that *Laffey* is merely a reaffirmation of current case law, not a change in law, and that defendant has waived any opportunity to argue that Terris and Sunderland's normal billing rate is the appropriate market rate by the failure to assert this position in earlier proceedings. This contention is without merit. The Court of Appeals decision in *Laffey* constitutes a significant change in the

law and this Court must now decide how this change is applicable to the instant case.

The first issue before the Court is whether Terris and Sunderland's normal billing rate constitutes an established market rate as defined by *Laffey* that should be used in computing the lodestar fee. Defendant contends that plaintiffs are no different than the quasi-public interest law firm involved in *Laffey* and should be subject to payment according to its "long standing history of market rates charged to clients." Def. Mem., p.5. Defendant presents Terris and Sunderland as being no different than any ordinary private law firm.

Plaintiffs oppose this characterization, contending both that Terris and Sunderland is not a law firm with a "customary private practice" and that it has no firmly established billing rate. Plaintiffs point to the distinctions that exist between Bredhoff & Kaiser, the firm seeking fees in *Laffey*, and Terris and Sunderland to illustrate that it has a different practice. The two most noteworthy distinctions include the fact that Terris and Sunderland has no "partnership track" where lawyers can expect to eventually become partners and the firm bills at a flat rate, with no consideration made for an attorney's experience or qualifications. Plaintiffs further argue that they have no established billing rate; instead their rates are set "at levels that will allow it to provide representation to individuals and groups who could not afford counsel at full market rates." Pl.Mem., p.10. Plaintiffs, thus, contend that Terris and Sunderland is a public interest law firm with no established billing rate, and not subject to the holding of *Laffey*.

The Court disagrees with plaintiffs' contention. Sufficient evidence is available to conclude that Terris and Sunderland has an established billing rate, pres-

ently set at $80 per hour for partners and $65 per hour for associates. Terris Dep. at 14. It is clear that the $80/65 rate is charged to all clients unless two conditions exist: the client cannot pay and attorney fees can be obtained under an applicable statute. Terris Dep. at 13. Plaintiffs only infrequently encounter a situation where their normal fees are reduced. Terris Dep. at 10-11. At all other times, plaintiffs charged their clients their normal rates.

Plaintiffs argue that this rate does not qualify as an "established billing rate" because it fails to reflect the market value of the firm's legal services but instead reflects a choice "to cater[] to people who have very limited sums of money." Terris Dep. at 29. The Court of Appeals in *Laffey* discounted a similar argument, stating that "the fact that [the applicant's] clients cannot afford unlimited legal fees fails to distinguish them." *Laffey*, slip op. at 19 n.69. Plaintiffs have chosen "to cater" to a particular segment of the market by using lower rates, thereby avoiding competition from the "premium" firms whose high rates could not be paid by plaintiffs' clients. The Court finds that plaintiffs do indeed have an established billing rate, $80 per hour for partners and $65 per hour for associates, which results in a merits lodestar of $181,820.15 and a fee litigation lodestar of $40,400.00.

Though adopting a rate less than that included in the original award, the Court is convinced that this case is one of the "rare cases" referred to in *Blum*, 104 S.Ct. at 1549, where an upward adjustment based on quality of representation is entirely appropriate. Though *Blum* indicated that "the quality of representation . . . generally is reflected in the reasonable hourly rate," the Supreme Court pointed out that quality of representation "may justify an upward

adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional'." *Id.*

In the September 17 Memorandum this Court specifically noted that plaintiffs' work product "[had] been superior throughout," Mem. Op. p.8, and made an award at hourly rates "equal to or below prevailing market rates in the District of Columbia for lawyers of similar skill and experience." Mem. Op. p.9. Explicit in the calculation of the award at prevailing market rates was that plaintiffs' services were equal in quality to those of attorneys charging that rate, thus clearly indicating that plaintiffs' services were far superior to what could be reasonably expected of attorneys charging a maximum of $65 per hour for associates and $80 per hour for partners. This Court has already described the relief achieved as "exceptional" within the meaning of *Blum*, albeit in a different context. Mem. Op. pp.13, 16-17. The relief achieved through entry of the Consent Decree was indeed exceptional substantially eliminating seven previous years of hiring disparities, and carrying a conservatively estimated monetary value of $8.6 million. Pl. App. 4-6. In view of plaintiffs' superior services and exceptional success, the Court believes that the merits lodestar should be adjusted upwards by 54.75%, producing an enhancement of $99,546.53.

Defendant also questions this Court's use of a contingency multiplier in the original award where the odds of success were estimated to be 75%, pointing to the *Laffey* court's rejection of a multiplier where it was held that there was a 50% chance of success. Defendant misreads the September 17 Memorandum

and *Laffey* in reaching this conclusion. While the Court of Appeals did state that "[a]ny crude multiplier derived simply from the plaintiff's chance of success must be rejected as contrary to the congressional scheme," *Laffey*, slip op. at 48, the Court stopped short of declaring the impropriety of a contingency "enhancement" in every case. *Id.* at 48-49. The Court in *Laffey* did hold that an insufficient showing had been made by plaintiffs' counsel to qualify as an exceptional case pursuant to *Blum*. *Id.* at 49.

This Court in its September 17 Memorandum went beyond merely examining the chance of success in awarding a contingency adjustment to plaintiffs. This Court found, pursuant to *Blum* and *Murray*, that this was an exceptional case worthy of a contingency adjustment. The specific circumstances justifying the enhancement enumerated in the September 17 Memorandum bear repeating here.

> Both legal and factual complexity and uncertainty existed at the commencement of this suit. For example, on the critical issue of employment test validation, there was no legally preferred method of validation, and plaintiffs had no knowledge of whether defendant in fact employed validation procedures. That remained to be uncovered through discovery. Furthermore, plaintiffs' counsel were obviously committing significant time and resources, particularly in view of the firm's small size. Class actions involve efforts beyond those associated with an ordinary lawsuit, and the massive statistical evidence required expert (and expensive) analysis. It appears to the Court that a contingency adjustment is "necessary to facilitate the filing" of cases of this type, where both the scope of the

> claims and the number of complainants are atypical.

Mem. Op. pp.16-17 (citations omitted). Unlike *Laffey*, plaintiffs' counsel did make sufficient showing to qualify as an exceptional case.

The reasoning used by this Court in the original award for granting the contingency adjustment is not changed by *Laffey*. While the September 17 Memorandum does make mention of the district court decision in *Laffey*, 572 F.Supp. 354 (D.D.C. 1983), the reasoning used there, based on *Blum* and *Murray*, would stand even were those references to *Laffey* excised from the opinion. Consequently, for the reasons cited by the Court here and in the September 17 Memorandum, the risk of nonpayment undertaken by counsel in this case is "exceptional" within the meaning of *Blum* and *Murray*, and a 20% enhancement, totaling $36,364.03, is awarded.

The Court finds it unnecessary to address the propriety of its award of $37,971.03 as reimbursement for reasonable litigation expenses. In addition, *Laffey* expressly approves the use of current rates against federal defendants to counterbalance the delay in payment as well as to simplify the task of the district court. *Laffey*, slip op. at 33 n.104. These portions of the original award remain intact.

Plaintiffs have submitted a supplemental application for an award of attorney's fees and expenses arising incident to litigating the motion for reconsideration. Included in this application is a request for fees for time expended litigating plaintiffs' original application for attorney's fees. Plaintiffs are not entitled to compensation for the 10.75 hours associated with litigating their original application. Any compensation for those hours should have been presented to the Court in time to have been considered

in the September 17 Memorandum. The Court's consideration of defendant's motion was not intended to provide plaintiffs with a second opportunity to obtain fees for hours not included in their original application.

The Court must next determine what portion of the remaining hours was reasonably expended litigating the applicability of *Laffey*. *Copeland III*, 641 F.2d at 891. Plaintiffs have provided sufficient documentation so that the Court can make an independent determination as to whether or not the hours claimed are justified. The Court finds that the hours submitted by plaintiffs, except those categorized as research and miscellaneous, should be reduced by one third. This leaves plaintiffs with 99.5 hours billable to associates and 9.75 to partners. As previously established, the proper hourly rate to be used in calculating the lodestar fee is $65 for associates and $80 for partners. With expenses, this Court finds reasonable a fee litigation lodestar of $9,367.72.

Accordingly, defendant's motion for reconsideration is granted and plaintiffs are entitled to a total payment of $405,469.46. This figure represents a total merits lodestar of $317,730.71 ($181,820.15 plus the 54.75% quality enhancement, $99,546.53, and the 20% contingency enhancement, $36,364.03), a fee litigation lodestar from the original application of $40,400.00, $37,971.03 for expenses, and $9,367.72 in fees for litigating the motion for reconsideration. As defendant has already been ordered to pay $257,662.21, plaintiffs are awarded an additional amount of $147,807.25.

An appropriate order follows.

/s/ John Lewis Smith, Jr.
United States District Judge

Dated: December 21, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL, PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Dec. 21, 1984]

ORDER

Upon consideration of defendant's motion for reconsideration of this Court's September 17, 1984 Order, plaintiffs' response, oral argument by counsel, and the entire record herein, it is by the Court this 21st day of December, 1984

ORDERED that defendant's motion is granted and that the award to plaintiffs of $439,541.48 is rescinded. It is further

ORDERED, for the reasons stated in the accompanying Memorandum, that in addition to the $257,662.21 awarded to plaintiffs by the two Orders of November 7, 1984, plaintiffs are entitled to attorney's fees and expenses in the amount of $147,807.25, said amount to be paid on or before January 22, 1985.

/s/ John Lewis Smith, Jr.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Nov. 7, 1984]

ORDER CONCERNING AWARD OF FEES
AT CURRENT RATES

Upon consideration of Plaintiffs' Motion for an Award of Uncontested Attorneys' Fees and Costs, Defendant's Opposition thereto, Plaintiffs' Reply, and the representations of counsel at oral argument, the Court hereby reaffirms its September 17, 1984, finding that the use of current hourly rates is appropriate in this case. It is therefore hereby

ORDERED that defendant pay plaintiffs a sum of $38,222.81 in attorneys' fees, which represents the difference between the uncontested amount (based on the historical hourly rates of plaintiffs' counsel when the work was performed) and the amount of fees as calculated based on the use of the hourly rates in effect when the Fee Application was filed. This sum is to be paid within 14 days of the date of this Order.

The Court hereby expressly determines pursuant to Rule 54(b) that there is no just reason for delay in the entry of a final judgment as to the issue of the use of current hourly rates and directs entry of final judgment as to that issue.

SO ORDERED this 7th day of November, 1984,

/s/ John Lewis Smith, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Nov. 7, 1984]

ORDER CONCERNING UNCONTESTED FEES

Upon consideration of Plaintiffs' Motion for an Award of Uncontested Attorneys' Fees and Costs, Defendant's Opposition thereto, Plaintiffs' Reply, and the representations of counsel at oral argument, the Court finds that the sum of $183,997.34 in attorneys' fees (based on historic rates charged by plaintiffs' counsel) and $35,442.06 in costs is uncontested. Pursuant to *Parker v. Lewis*, 670 F.2d 249, 250 (D.C.

Cir. 1982) (per curiam), the Court finds that there is no reason for further delay in the payment of fees conceded to be "properly due and owing." It is therefore hereby

ORDERED that defendant pay plaintiffs a sum of $219,439.40 in attorneys' fees and expenses within 14 days of the date of this Order.

The Court hereby expressly determines pursuant to Rule 54(b) that there is no just reason for delay in the entry of a final judgment as to the portion of attorneys' fees and expenses that have not been contested by the parties and directs the entry of final judgment as to that issue.

SO ORDERED this 7th day of November, 1984

/s/ John Lewis Smith, Jr.
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Sept. 17, 1984]

ORDER

Upon consideration of plaintiffs' application for an award of attorney's fees and expenses pursuant to § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), defendant's response, and the entire record, it is by the Court this 14th day of September, 1984

ORDERED, for the reasons given in the accompanying memorandum, that plaintiffs are entitled to an award of attorney's fees and expenses in the amount of $439,541.48. It is further

ORDERED that defendant shall pay plaintiffs the sum of $439,541.48 no later than October 14th, 1984.

/s/ John Lewis Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-1439

ALISON PALMER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

Civil Action No. 77-2006

MARGUERITE COOPER, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, DEFENDANT

[Filed Sept. 17, 1984]

MEMORANDUM

This matter is before the Court on plaintiffs' application for an award of attorney's fees and expenses under § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). In applications filed December 12, 1983, and July 12, 1984, plaintiffs request a total of $450,797.12 in fees and expenses. The request arises from a class action against the Department of State, in which plaintiffs alleged widespread sex discrimination by defendant with respect

to employment practices in the Foreign Service. On October 12, 1983, some seven years after suit was filed, this Court approved a consent decree settling the portion of the case involving applicants for junior-level Foreign Service positions. That decree supplies the basis for plaintiffs' claim that they are the "prevailing party" and thereby entitled to an award under § 706(k).

This is an unusual case. Major pieces of Title VII litigation often produce major pieces of attorney's fees litigation. The substantive standards involve resolution of numerous factual issues, subsumed under this analytical heading or that, all litigable, and all subject to an imprecise test of "reasonableness." The procedural standards, most thoroughly set out by the Court of Appeals in *National Association of Concerned Veterans* v. *Sec'y of Defense*, 675 F.2d 1319 (D.C. Cir. 1982), require detailed documentation of the attorney's efforts, and establishment through affidavit of a "prevailing market rate" in a "market" that really does not exist. The result is often lengthy records, lengthy proceedings, and lengthy "opinions" where the Court not so much opines but rather acts as a blackrobed bookkeeper. It is not surprising that judges frequently decry the entire process.

This case is not like that. The issues are few in number, and legal in character. The government offers no opposition on several key questions. It concedes that plaintiffs are the prevailing party. It does not challenge in any respect the "reasonableness" of the hours claimed by plaintiffs. It provides but four pages of evidence of prevailing market rates. For their part, plaintiffs base their request for a multiplier on only one of the three grounds generally ac-

cepted as supporting an adjustment to the lodestar. The parties join issue on only three matters: the prevailing market rate, the use of current market rates in claims against the government, and plaintiffs' entitlement to compensation for certain expenses. Upon careful review of the record, and of recent developments in the law, the Court concludes that plaintiffs are entitled to an award of $439,541.48.

1. *The Lodestar: Appropriate Hourly Rate*

"The initial task in determining an appropriate fee award . . . is to establish the 'lodestar': the number of hours expended multiplied by a reasonable hourly rate." *Concerned Veterans, supra,* 675 F.2d at 1323 (citing *Copeland* v. *Marshall,* 641 F.2d 880, 891 (D.C. Cir. 1980) (*en banc*) ("*Copeland III*")). *See also Hensley* v. *Eckerhart* 103 S.Ct. 1933, 1939 (1983). Defendant does not question the "number of hours expended" by plaintiffs' counsel, and with good reason: plaintiffs fully document and justify the hours claimed.[1] Defendant does challenge plaintiffs'

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[1] Plaintiffs claim a total of 2746.63 hours devoted to merits issues, and 642.25 hours to the fee litigation. The application carefully distinguishes between time devoted to the "employee" and to the "applicant" portions of the case, and offers a reasonable method for compensating efforts common to both claims. *See* Plts. Mem. at 13-19; First Terris Affidavit at ¶¶ 41-45; *cf. Hensley* v. *Eckerhart, supra,* 103 S.Ct. at 1940-41. Furthermore, counsel's "billing judgment," *id.* at 1940, as articulated and as applied, cannot be criticized. Counsel exercised it in a conscientious and fair manner throughout. *See* Plts. Resp. Interr. No. 15 (filed June 4, 1984); Terris Depo. at 51-57 (filed June 10, 1984); Attachment D to Dec. 12 App. (contemporaneous time records).

As noted, defendant does not "challenge the accuracy and reasonableness of the hours charged." *Blum* v. *Stenson,* 104

requested hourly rates, and to that issue the Court now turns.

Seventeen different attorneys from Terris & Sunderland worked on this matter over the past eight years. The proposed rate schedule, based on years of experience, ranges from a high of $150 per hour for Mr. Terris, to a low of $75 per hour for the most junior associates. *See* Plts.Mem. at 20. Because of the firm's policy of assigning primary responsibility at any given time to one or two associates, attorneys in the 4-7 and 8-10 year categories ($95-110) performed most of the work. *See id.;* First Terris Affidavit at ¶ 14.

Plaintiffs' proposed rate schedule is tested against this standard: "a reasonable hourly rate [is] that prevailing in the community for similar work." *Concerned Veterans, supra,* 675 F.2d at 1323 (citing *Copeland III, supra,* 641 F.2d at 1323). Defendant finds plaintiffs' proposal excessive. According to defendant, "similar work" means representation of plaintiffs in Title VII cases. "Prevailing rate" means the actual rate charged to plaintiffs by the applicant and by other Title VII attorneys. Defendant suggests that its own settlement policy, offering rates in a $45-75 range, more accurately reflects the true "prevailing community rate." *See* Def.Mem. at 2-3.

This approach is incorrect. The Supreme Court, the Court of Appeals, and this Court have rejected the various premises of defendant's argument, as well as its method of presentation. Needless to say, de-

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S.Ct. 1541, 1545 n.5 (1984). Nonetheless, the Court has reviewed the record and reached an "independent determination [that all] the hours claimed are justified." *Concerned Veterans, supra,* 675 F.2d at 1327. *See also Wojtkowski* v. *Cade,* 725 F.2d 127, 130 (1st Cir. 1984).

fendant's evidentiary offerings are of the sort expressly condemned in *Concerned Veterans*:

> "It should be recognized that fees awarded in other cases are probative of the appropriate community rate only if they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and issues of comparable complexity were raised . . .
>
> "A blunderbuss array of cases specifically selected to support a low hourly rate does not assist the District Court in determining the prevailing community rate. Carefully selected cases organized in a meaningful fashion, on the other hand, would be extremely useful." *Concerned Veterans, supra*, 675 F.2d at 1325 n.7.

Defendant's legal argument is also deficient. Defendant incorrectly limits the inquiry to the plaintiff's side of the "Title VII market." In 1983, this Court rejected the notion that there are "separate prevailing rates for the defense and prosecution of Title VII actions." *Laffey* v. *Northwest Airlines*, 572 F.Supp. 354, 374 (D.D.C. 1983). In 1984, the Supreme Court rejected the notion that subject-matter defines [*sic*] statutory fee awards are set according to the "same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases. . . ." *Blum* v. *Stenson*, *supra*, 104 S.Ct. at 1546 (quoting S. Rept. No. 94-1011 p.6, U.S. Code Cong. & Admin. News 1976 pp. 5908, 5913). The key aspect of a case is its complexity, not its cause, a proposition in accord with both the law and the views of practitioners (*see infra* note 3).

Defendant is correct in observing that the court must examine the actual rates charged by plaintiffs' counsel. *See Concerned Veterans, supra*, 675 F.2d at 1326 (actual rate "highly relevant proof of the prevailing community rate"). The cases, however, recognize that firms may charge rates that—"for whatever reason—do not reflect the full value of [their] services." *Laffey* v. *Northwest Airlines, supra*, 572 F.Supp. at 374. *See also Blum, supra*, 104 S.Ct. at 1547 & n.11; *Concerned Veterans, supra*, 675 F.2d at 1326 n.7a; *Copeland III, supra*, 641 F.2d at 900. Some firms, including plaintiffs' counsel, charge rates that are "reduced to reflect the financial constraints of their clientele," *Laffey, supra*, 572 F.Supp. at 373, and others—the "public interest" bar—charge nothing at all.[2] All agree that employment and civil rights litigation is frequently, if not typically, handled by such firms. *See* Def.Mem. at 3; Plts.Reply at 8. Defendant finds great meaning in this circumstance: "[j]ust as in any other market, if all or most consumers pay a lower cost, that 'reduced rate' is the market rate." Def.Mem. at 3. The Supreme Court, however, reached a different conclusion:

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[2] Named plaintiff Alison Palmer agreed to pay Terris & Sunderland rates of $25 per hour between 1976 and 1979 and $30 per hour from 1980 to present. *See* First Terris Affidavit at ¶ 6. The agreement specifically notes that the rates are "below the ordinary market rate" and the firm agreed to them "only because of the limited financial resources of Ms. Palmer." Ms. Palmer has paid approximately $113,000 to the firm, and apparently continues to pay at the rate of $1,000 per month. *See* Plts. Resp. Interr. Nos. 2, 7; First Terris Affidavit at ¶ 6; Terris Depo. at 22. Terris & Sunderland also received fairly small voluntary contributions from other members of the class. *See* Terris Depo. at 22-24. The agreement also contains detailed provisions regarding distribution of any attorney's fees award or settlement. *See* Terris Depo. at 24-26.

> "Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a non-profit legal services organization. The citations to *Stanford Daily* and *Davis* make this explicit. In *Stanford Daily*, the court held that it 'must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of *pro bono publico* than as an effort at securing a large monetary return.' 64 F.R.D. at 681." *Blum, supra*, 104 S.Ct. at 1547 (citations omitted).

The "lower costs" defendant points to are a function of the type of firm charging them. The type of firm after *Blum* is irrelevant. *Blum* thus seems to read much of the relevance out of an attorney's "actual charge," and nothing in *Concerned Veterans* precludes a court from examining the actualities of "actual rates." *Cf.* 675 F.2d at 1326 n.7a. The *Blum* and *Laffey* cases make clear that actual rates do not necessarily reflect "market value," and market value is the touchstone of the fee inquiry.

Market value is properly derived by evaluating the complexity of the litigation, and the "skill, experience, and reputation" of the attorney handling the matter. *Blum, supra*, 104 S.Ct. at 1547 n.11. The focus then shifts to the community:

> "An applicant is required to provide specific evidence of the prevailing community rate for the type of work for which he seeks an award. For example, affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases provide prevailing community rate infor-

> mation. Recent fees awarded by the courts or through settlement to attorneys of comparable reputation and experience performing similar work are also useful guides in setting an appropriate rate." *Concerned Veterans, supra*, 675 F.2d at 1325.

Plaintiffs make all the showings necessary to justify the proposed rate schedule. There is no question that the case was and is complex. Defendant does not dispute it, and the record reveals it. The case involved across-the-board challenges to a particularly obscure personnel system. The procedural device was a class action. The substantive law was in flux. This case was no ordinary lawsuit.

There is also no question that the attorneys of Terris & Sunderland possess skill and experience in employment matters. Fifteen to twenty percent of the firm's caseload involves Title VII cases. *See* Plts.Resp.Interr. No. 24; First Terris Affidavit at ¶ 1; Attachment B to Dec. 12 App. Resumes of the individual attorneys who participated reveal substantial experience and interest in the area. Finally, the Court's own familiarity with the work-product of the firm confirms these observations. Their work has been superior throughout.

Plaintiffs supply considerable community information against which to compare their request. Affidavits from a number of Washington attorneys establish several points: 1) employment cases are as difficult to prosecute and defend as other types of federal litigation; 2) local lawyers charge the same fees for employment cases as they do in other cases; and 3) the rate schedule proposed by plaintiffs is, as plaintiffs observe, "equal to or below prevailing market rates in the District of Columbia for lawyers of

similar skill and experience." Plts.Mem. at 23.[3] Plaintiffs also describe fee awards in a number of other cases, including this Court's awards in *Laffey* and *Bachman* v. *Miller*, 567 F.Supp. 317 (D.D.C. 1983).[4] All of these materials—unchallenged by defendant—support the Court's conclusion that plaintiffs' proposed rate schedule is consistent with "prevailing community rates" and therefore appropriately used in calculating the lodestar.

One final matter with respect to that calculation remains. Defendant argues that use of current rates, *i.e.*, 1984 rates for work done in 1979, represents an implicit claim for interest barred by sovereign immunity. *See* Def.Mem. at 6-8. The government cites numerous cases reciting the familiar rule that absent specific statutory waiver, interest cannot be awarded against the government. The government, however, does *not* cite ¶ 706(k), the statutory basis of plaintiffs' application:

> "(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee

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[3] For Point 1, *see* Affidavit of Richard B. Sobel at ¶¶ 7-13 (Attachment E); Affidavit of Barry L. Goldstein at ¶ 6 (Attachment F); Affidavit of James Robertson at ¶ 6 (Attachment U). For Point 2, *see id.*; Affidavit of Daniel A. Reznick at ¶ 7 (Attachment T). For Point 3, *see id.* at ¶¶ 13-14, 16; Robertson Affidavit at ¶ 8.

[4] In *Laffey*, the Court awarded attorney's fees in the 4-7 and 8-10 year categories at $100 and $125, respectively. 572 F.Supp. at 371, 375. In *Bachman*, the Court awarded attorneys with five years experience $90. 567 F.Supp. at 321. *See also Plannells* v. *Howard University*, 34 FEP Cases 66, 68 (D.D.C. Feb. 17, 1984).

as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

Section 706(k) permits an award of "costs" to the prevailing party. It includes a "reasonable attorney's fee" as "part of the costs." It provides that the United States "shall be liable for costs the *same as a private person.*" "Private persons" are not entitled to sovereign immunity. "Private persons" who lose Title VII suits may be required to compensate the winner at current rates. *See, e.g., Laffey, supra,* 572 F.Supp. at 380-81. Section 706(k) is a statutory waiver of sovereign immunity, and current rates may be employed when calculating a fee award against the government. *See Murray* v. *Weinberger,* No. 83-1680 (D.C. Cir. Aug. 24, 1984); slip op. at 17-19.[5] *See also Copeland III, supra,* 641 F.2d at 893 n.23; *Concerned Veterans, supra,* 675 F.2d at 1329. The sovereign immunity bar on awards of interest simply is not applicable, and use of current rates is appropriate.

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[5] In *Murray* v. *Weinberger,* the Court of Appeals acknowledged but did not address the prejudgment interest/sovereign immunity theory advanced in opposition to a lodestar adjustment based on delay in payment. The Court apparently was not troubled by the argument's implications in the current rates context. Indeed, the Court expressly approved the use of current rates against the government to "counterbalance the delay in payment as well as simplify the task of the district court." *Id.* at 18. *See also Copeland III, supra,* 641 F.2d at 893 n.23; *Concerned Veterans, supra,* 675 F.2d at 1328-29. An "either-or" rule emerges from the cases: the applicant may calculate the lodestar according to current rates, or she may rely on historical rates and seek an adjustment for "delay in payment." The former approach is favored, and is appropriate here.

In sum, the Court finds reasonable a merits lodestar of $281,391, and a fee litigation lodestar of $63,901.25, for a final lodestar of $345,292.25. The next issue is whether an award above that amount is appropriate.

2. *Adjustments to the Lodestar: Contingent Nature of Success*

Plaintiffs urge that the merits lodestar be adjusted upward by 24% to compensate for the "contingent nature of the case." Prior to 1984, the theory and practice of the "contingency" or "risk of nonpayment" adjustment was fairly well-established. As the Court of Appeals explained, the adjustment is intended to "compensate for the risk that the lawsuit would be unsuccessful and that no fee at all would be obtained," because only prevailing parties are entitled to a statutory fee award. *Copeland III*, *supra*, 641 F.2d at 892. The analysis looks first to the terms of any fee arrangement between plaintiff and counsel, because an adjustment is "appropriate only if counsel would have received no significant remuneration if the suit were not successful." *Concerned Veterans*, *supra*, 675 F.2d at 1328. The inquiry then turns to the "specific circumstances" of the case, *id.*, supporting an adjustment, a test most thoroughly described in this Court's 1983 decision in *Laffey* v. *Northwest Airlines* (*see infra* at 13.).

Recent decisions by the Supreme Court and the Court of Appeals, however, cast doubt on the continuing validity of the contingency adjustment. In *Blum* v. *Stenson*, the Supreme Court held that the lodestar figure "normally provides a 'reasonable' attorney's fee within the meaning of the statute." 104 S.Ct. at 1548 (citing *Hensley* v. *Eckerhart*, *supra*,

103 S.Ct. at 1940). The Court observed that any "upward adjustment to the presumptively reasonable fee of rate times hours is appropriate" only in "the rare case." *Id.* at 1550 n.18. The Court, however, noted that it had "no occasion in this case to consider whether the risk of not being the prevailing party . . . may ever justify an upward fee adjustment." *Id.* at n.17.

The Court of Appeals considered the *Blum* case five months later in *Murray* v. *Weinberger*. In *Murray*, the Court emphasized that *Blum* did not expressly approve the contingency adjustment doctrine, and that, in any event, "an upward adjustment to compensate for the risk of losing . . .is permissible only in an *exceptional case*." Slip op. at 16 (emphasis supplied). The Court described the "minimum requirements that must be met" to obtain the adjustment:

> "The upward adjustment is not proper when: (1) the lodestar itself comprehends an allowance for the contingent nature of fee payment; or (2) the fee applicant bore little or no risk of nonpayment because of a fee arrangement with the client; or (3) the case is not exceptional within the meaning of *Blum* v. *Stenson*." *Id.* at 14.

Plaintiffs' request here for an adjustment must be evaluated under these new standards. The first and second prongs of the *Murray* "minimum requirements" test are considered in the margin.[6] More dif-

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[6] Quite frankly, the Court has some difficulty in understanding the *Murray* Court's explication of the first "minimum requirement": an adjustment is "not proper when (1) the lodestar itself comprehends an allowance for the contingent nature of fee payment." *Id.* at 14. In *Concerned Veterans,*

ficulty comes in applying the third test: a risk of loss adjustment is proper only if the case is "exceptional within the meaning of *Blum* v. *Stenson*." *Id.*

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the Court observed that the hourly rate could "reflect the possibility that the suit would not succeed and no fee would be obtained," and urged applicants to "present the proposed lodestar billing rate exclusive of any risk premium." 675 F.2d at 1328. The "contingent nature of fee payment," of course, is due to the requirement that only prevailing parties are entitled to a fee award. The contingency is the possibility of an adverse ruling by the court. In a setting where the proposed rate already takes that possibility into account, an adjustment is obviously unwarranted.

The *Murray* Court puts a somewhat different spin on the inquiry:

> "All lawsuits have a risk of nonpayment attached to them. As we noted in *Copeland* v. *Marshall*, every attorney faces a risk of not getting paid for some of the work expended on behalf of a client, because, for a variety of reasons, not all hours worked are billed and recouped by an attorney. The hourly rates which attorneys charge reflect the fact that a certain number of hours rendered will not generate any legal fees. The market-based hourly rate which is incorporated into the lodestar figure therefore includes an increment for the normal risk of not being paid for some of the hours that an attorney expends. Thus, an enhancement of the lodestar figure for the risk of nonpayment is not proper if the risk of nonpayment in the particular case is the same as it is in the average case in the relevant market." Slip op. at 14-15 (footnotes omitted).

In *Murray*, "risk" no longer means the possibility of losing the suit. "Risk" essentially means "billing judgment," a matter that seemingly has little to do with the traditional understanding of the contingency doctrine. The *Murray* Court does acknowledge the "possibility of loss" formulation in its third "minimum requirement," but the salient point is that an already "inherently imprecise" determination, *Copeland III*, *supra*, 641 F.2d at 893, now has an added gloss that is some-

at 14. Despite citing a "pressing need for simple rules in attorney's fees cases," *id.* at 18, the Court unfortunately failed to describe any circumstances

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what remote from its theoretical foundation. In addition, the *Murray* Court offers no guidance on how to go about applying its new risk of nonpayment rule. The rule appears to require the district court to examine the billing judgment exercised by the applicant, determine whether it generally matches community practice (*i.e.*, the "average case in the relevant market"), and deny any adjustment if the applicant's "billing judgment increment" is excessive. (Needless to say, an adjustment is improper under the *Copeland III/Concerned Veterans* formulation of the first minimum requirement if the proposed rate includes an allowance for the possibility of loss on the merits.) The Court is already required to examine the applicant's billing judgment in calculating the lodestar, and as noted *supra* note 1, Terris & Sunderland's practice is not extraordinary or unusual in any way. The Court therefore concludes that plaintiffs' application satisfies both traditional and *Murray* standards; the proposed hourly rate does not include an allowance for risk of loss, and it does not include an excessive allowance for "non-billable" work.

With respect to the second minimum requirement, the retainer agreement with Ms. Palmer assured plaintiffs' counsel of some "remuneration." (*see supra* note 2). The percentage adjustment proposed by counsel takes this "partial contingency" into account: "[the contingency portion] was calculated by determining the ratio of the average hourly rate for merits issues paid by plaintiffs ($28.51) and the average hourly rate for merits issues requested in this application ($102.45) . . . This ratio (0.72) represents the percentage of the case which was contingent. This percentage was then multiplied by 33%. The resulting 24% rate is the effective contingency rate for all plaintiffs' work on merits issues for the applicant class." Plts. Mem. at 31-40. (Derivation of the 33% percentage is explained *id.* at 37-39. *See also* Plts. Reply at 22). This approach adequately captures the degree to which the risk of nonpayment was reduced by the fee arrangement.

that may be deemed to be "exceptional within the meaning of *Blum*." This omission is particularly troublesome, because, as noted, *Blum* itself did not involve an express request for a risk of loss adjustment. Moreover, *Blum* did not define "exceptional." The Court included the degree of success achieved as one mark of the exceptional, but did not limit the relevant factors solely to the "results obtained." 104 S.Ct. at 1550 (citing *Hensley, supra*, 103 S.Ct. at 1940). The *Murray* Court does suggest that an "exceptional" case is "one of those rare cases in which [an adjustment] is necessary to facilitate the filing of meritorious claims," but does not describe the sort of setting where the desired behavorial incentives may be found. In short, the simplicity of these standards is difficult to discern.

Perhaps the best course is to review current contingency law against the backdrop of the *Blum* opinion, and determine whether *Blum* rules out reliance on any previously relevant factor. In *Laffey*, Chief Judge Robinson outlined the test:

> "In order to assess the risk that Plaintiffs' counsel accepted at the outset of this litigation, the Court must consider not only the probability of success but what was being risked. The former category requires an evaluation of (1) the legal and factual complexity of the case; (2) the probability of defendant's liability, including whether it has been suggested by previous proceedings and whether it is asserted under existing case law or is advanced as a novel theory; and (3) the difficulty or ease with which damages (if any) could be proven. The latter category includes the number of hours and the amount of out-of-pocket expenses risked without

guarantee of compensation." 572 F.Supp. at 378 (citation and footnote omitted).

The *Laffey* approach defines "risk at the outset" as a function of the merits and the mechanics of the litigation, with the complexity of the case obviously affecting both elements. In *Blum*, however, the Supreme Court found that "neither complexity nor novelty of the issues . . . is an appropriate factor in determining whether to increase the basic fee," because those factors "presumably were fully reflected in the number of billable hours recorded by counsel." 104 S.Ct. at 1548-49.

A close reading of *Blum* suggests that *Laffey's* contingency analysis, incorporating consideration of complexity and unsettled law, remains good law. First, the Supreme Court only ruled out complexity in and of itself as a basis for an upward adjustment. *See id.* at 1548. The Court did not reach the general question of contingency adjustments, much less the narrower matter of calculating one. Second, the Court emphasized the thin record before it. The applicant in *Blum* apparently made no novelty or complexity argument. There was nothing in the affidavits or briefs "identify[ing] any risks associated with the litigation." *"On this record,"* the Court concluded, "any upward adjustment for the contingent nature of the litigation was unjustified." *Id.* at 1550 (emphasis supplied). The Court did not foreshadow the result in a case like this one, with a carefully assembled and documented request.

Third and more generally, the *Laffey* approach is consistent with at least one broader theme of the *Blum* opinion: equal treatment of private and public-interest attorneys. A complex or novel matter obviously requires more work. As the *Blum* Court

made clear, the realities of document searches and sophisticated legal analysis are fully addressed by the lodestar formula: hours billed multiplied by a rate reflecting the demands upon, and the abilities of, the prevailing party's attorney.

As the Court noted, however, "the product of reasonable hours times a reasonable rate does not end the inquiry." *Id.* at 1548 n.14 (quoting *Hensley, supra*, 103 S.Ct. at 1940). Complexity and novelty present problems going beyond late nights at the office. Unsettled law "magnifies the risk" of an unsuccessful suit because it increases the likelihood of appeal and changes in controlling law. Complicated and wide-ranging claims raise the possibility of a smoking gun in the files pointing directly at plaintiff, and the certainty of counsel's "substantial investment (both in time and out-of-pocket expenditures) over an extended period." *Laffey, supra*, 572 F.Supp. at 378-79 & n.48. It bears repeating that risk is assessed at the outset, where both controlling law and conclusive fact are but subjects of prediction.

It also bears note that while private attorneys are compensated whether their predictions are accurate or not, public-interest or reduced-rate lawyers have no such security. The value to the private attorney of her fees comes only from the dollar amount but also the near certainty of payment (barring the client's bankruptcy or similar financial disaster). The "risk premium" of *Concerned Veterans* simply serves as a proxy for the security element inherent in the private attorney's fee. In a legal regime where distinctions between private and public-interest firms are irrelevant, *see Blum, supra*, 104 S.Ct. at 1547, and where the objective is to fashion a fee award closely modeled on "prevailing market standards," then the award must reflect both the effort of the

attorney and the certainty or uncertainty of ever receiving compensation for it. That is the purpose of the contingency adjustment, and the Court believes that the *Laffey* method of achieving it remains valid after *Blum*.

Plaintiffs adequately identify the "specific circumstances" supporting an adjustment in this case. *See* Plts.Mem. at 31-35. Both legal and factual complexity and uncertainty existed at the commencement of this suit. For example, on the critical issue of employment test validation, there was no legally preferred method of validation (*see Washington* v. *Davis*, 426 U.S. 229, 247 n.13 (1976)), and plaintiffs had no knowledge of whether defendant in fact employed validation procedures. That remained to be uncovered through discovery. Furthermore, plaintiffs' counsel were obviously committing significant time and resources, particularly in view of the firm's small size. Class actions involve efforts beyond those associated with an ordinary lawsuit, and the massive statistical evidence required expert (and expensive) analysis. *See* First Terris Affidavit at ¶¶ 29, 38. It appears to the Court that a contingency adjustment is "necessary to facilitate the filing" of cases of this type, where both the scope of the claims and the number of complainants are atypical.

At the same time, however, plaintiffs' lead counsel believed that the class had a strong case; he put the odds of success at 75%. *See id.* at ¶ 54; Terris Depo. at 41. The Court shares that belief, perhaps even more strongly. Upon consideration, the Court believes that the merits lodestar should be adjusted upward by 20% to fairly compensate plaintiffs' counsel for its efforts in taking on and successfully completing this portion of the litigation. The adjustment produces a final merits award of $337,669.20.

3. *Litigation Expenses*

The final issue concerns defendant's objection to $2,528.97 of the $35,880.99 sought by plaintiffs as reimbursement for "reasonable litigation expenses." Defendant claims that expenditures on postage, long distance telephone calls, photocopying, and others are part of overhead and thus not compensable. *See* Def. Mem. at 9. The test for compensability turns on whether the claimed expenses are routinely billed to clients, reasonable in amount, and adequately documented. *See Laffey, supra*, 572 F.Supp. at 382-83; *Plannells* v. *Howard University, supra*, 34 FEP Cases at 71. Plaintiffs' supporting materials and discovery taken by defendant demonstrate that the challenged expenses were and are customarily billed to clients, and given the scale of this action, were reasonable in amount. Consequently, the expenses claimed by plaintiffs should be awarded in full, for a total of $37,971.03.

4. *Conclusion*

Courts do not like attorney's fee litigation, and at every opportunity encourage parties to reach settlement. *See, e.g., Blum, supra*, 104 S.Ct. at 1550 n.19; *Concerned Veterans, supra*, 675 F.2d at 1330-31. The Court of Appeals in *Copeland III* and in *Concerned Veterans* set out specific substantive and procedural standards in part to encourage settlement of fee requests. In particular, the *Concerned Veterans* case requires the government defendant to assemble a "precise," "limited," "well-founded" challenge to the request, supported by "equally specific countervailing evidence." *Id.* at 1338 (Tamm, J., concurring), 1326. Blunderbusses do not carry burdens.

In this case plaintiffs filed a comprehensive, reasonable and thoroughly documented fee request. Plaintiffs attached all the required baggage. There are affidavits, resumes, and time slips. It was an eminently professional effort, fully in accord with the letter and spirit of *Copeland III* and *Concerned Veterans*.

The government, on the other hand, submitted a nine-page memorandum of law that practically ignores the law, and three lists apparently offered as "equally specific countervailing evidence." This Court has its doubts about the fee calculation standards that have evolved, but it has no doubt that all involved must play by the rules set down by the Supreme Court and the Court of Appeals. Should the government decide that the costs of playing by the rules exceed the difference in settlement positions, it should settle, rather than submit a sadly deficient (but inexpensive) "opposition" to the Court. The government should always remember that judges as well as fee awards are paid from the public treasury.

In sum, the Court concludes that plaintiffs' proposed lodestar figure, adjusted upward by 20%, represents a fully-compensatory fee. The Court is not penalizing defendant for less-than-artful advocacy; the award is based on review of the record and on a reasonable, documented application.

Accordingly, plaintiffs' request for an award of attorney's fees and expenses under 42 U.S.C. 2000e-5(k) is granted in the amount of $439,541.48.

An appropriate order follows.

/s/ John Lewis Smith, Jr.
United States District Judge

Dated: September 14, 1984

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No. 85-50

SUPREME COURT OF THE UNITED STATES

October Term, 1985

GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

ALISON PALMER, et al.

GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

MARGUERITE COOPER, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents adopt petitioner's statement of the case, noting only that

the issue in this case is similar to the question presented in the pending petition for certiorari in Library of Congress v. Shaw, No. 85-54.

The question presented here is whether Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), which makes the United States liable for "a reasonable attorney's fee * * * the same as a private person," waives the government's sovereign immunity so as to permit the calculation of an attorney's fee award against the United States on the basis of the attorney's current hourly rates. The question presented by the petitioner in Library of Congress v. Shaw is whether this same section waives the government's immunity against the payment of interest on attorney's fees awards.

REASONS FOR DENYING THE WRIT

SUMMARY

Respondents submit that the petition should be denied for two reasons!

First, for the reasons stated by respondent in his brief in opposition to the petition for a writ of certiorari in Library of Congress v. Shaw, the clear intent of Congress was to enact a complete waiver of the sovereign immunity of federal agencies in cases brought under Title VII of the Civil Rights of 1964. Consequently, the relief obtainable, including the amount of attorney's fees, against a federal agency in such cases is the same as that obtainable against all other employers.

Second, even assuming arguendo that Congress did not waive sovereign immunity as to interest on attorney's fee awards under Title VII, Congress clearly waived that immunity as to a "reasonable

attorney's fee." 42 U.S.C. 2000e-5(k). The courts of appeals have uniformly construed a "reasonable attorney's fee" to include an adjustment for delay in payment, and the use of current rates is one method of accounting for that delay.

ARGUMENT

A. SECTION 706(k) IS A COMPLETE WAIVER OF SOVEREIGN IMMUNITY

In his brief in opposition to the petition for a writ of certiorari in Library of Congress v. Shaw, respondent demonstrates that the clear intent of Congress was to enact a complete waiver of the sovereign immunity of federal agencies in cases brought under Title VII of the Civil Rights of 1964. Respondents here adopt the arguments of respondent in that case.

Consequently, the relief obtainable, including the amount of attorney's fees, against a federal agency in Title

VII cases is the same as that obtainable against all other employers. To compensate for delay in payment of those fees, the fee award for other employers may be adjusted either by adding interest or by using current hourly rates. Since the relief which may be obtained against federal employers is the same, courts may award attorney's fees when the government is the employer by adding interest or by using current rates.

B. EVEN ASSUMING ARGUENDO THAT SECTION 706(k) DOES NOT WAIVE SOVEREIGN IMMUNITY AS TO INTEREST, IT CLEARLY WAIVES SOVEREIGN IMMUNITY AS TO THE USE OF CURRENT HOURLY RATES

Petitioner argues that "there is no difference, for sovereign immunity purposes, between pure interest and the use of current rates (or any other delay adjustment to the lodestar) * * *." Pet. 6. It contends that, because both interest and current rates compensate

the recipient for delay in payment for services, both "must receive the same treatment for sovereign immunity purposes * * *." Id. at 7.

Respondents agree that both interest and current rates are used to adjust for delay in receipt of payment. However, it does not follow from this conclusion that the use of current rates is barred by sovereign immunity to the same extent as an award of interest.

Section 706(k) authorizes "a reasonable attorney's fee" as part of costs, and provides that the United States "shall be liable for costs the same as a private person." 42 U.S.C. 2000e-5(k)(1982). Judge Ginsburg, dissenting in Shaw v. Library of Congress, 747 F.2d 1469, 1488 (D.C. Cir. 1984), recognized that a waiver of immunity as to "costs" may not include a waiver of

immunity as to interest on those costs, because "in federal adjudication, the word 'costs' has never been understood to include any interest component." 747 F.2d at 1488. In contrast, in many federal cases, the words "reasonable attorney's fee" have commonly been understood to include an adjustment for delay in payment, and the use of current rates is one common method for accounting for that delay.

This Court held in Hensley v. Eckerhart, 103 S. Ct. 1933, 1940 (1983), that while the "product of reasonable hours times a reasonable rate" normally provides a "reasonable" attorney's fee within the meaning of a similar statute (42 U.S.C. 1988), "there remain other considerations that may lead the district court to adjust the fee upward or downward * * *." This Court reaffirmed

this holding in Blum v. Stenson, 104 S. Ct. 1541, 1548 (1984):

> The statute [42 U.S.C. 1988] requires a "reasonable fee," and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high.

The courts of appeals have uniformly recognized that the use of historic hourly rates in protracted cases, without any adjustment for delay, often does not produce a "reasonable fee." Murray v. Weinberger, 741 F.2d 1423, 1432-1434 (D.C. Cir. 1984); Graves v. Barnes, 700 F.2d 220, 224 (5th Cir. 1983); Gautreaux v. Chicago Housing Authority, 690 F.2d 601, 612 (7th Cir. 1982); Jorstad v. IDS Realty Trust, 643 F.2d 1305, 1313 (8th Cir. 1981); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Johnson v. University of Alabama,

706 F.2d 1205, 1210 (11th Cir. 1983), certiorari denied, 104 S. Ct. 489 (1983). "Such delay obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one." Johnson v. University of Alabama, supra, 706 F.2d at 1210.

Historic rates are established for fee-paying clients, not for court-awarded fees, and are based on the assumption that clients will pay their bills promptly. Copeland v. Marshall, 641 F.2d 880, 893 (D.C. Cir. 1980). A law firm generally does not establish its rates with the expectation that payment will be received many years after the services are provided. Otherwise, they would undoubtedly increase their hourly rates to account for that delay. As Judge Ginsburg stated in Shaw v. Library of Congress, supra, 747 F.2d

at 1485, "an attorney embarking on services for which he or she anticipates payment ultimately, but not promptly, may factor in the expected delay." On the other hand, current hourly rates are used to "approximate the value today of the historic rates charged at the time when the legal services actually were rendered." Murray v. Weinberger, supra, 741 F.2d at 1433.

Consequently, current rates, unlike interest, are not used to add to a "reasonable attorney's fee." Instead, they are used to arrive at a "reasonable attorney's fee." The use of current hourly rates therefore is not inconsistent with the "no-interest" rule. On the contrary, a prohibition on the use of current hourly rates would be inconsistent with the statutory requirement of a "reasonable attorney's fee."

CONCLUSION

For the foregoing reasons, the petition should be denied. In the alternative, the petition should be held for disposition in light of Library of Congress v. Shaw.

Respectfully submitted,

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No. 85-50

In the Supreme Court of the United States

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v.

MARGUERITE COOPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondents acknowledge that current rates are used in fee awards to compensate for delay in payment (Br. in Opp. 6).[1] They nevertheless insist that the "no-interest rule" (see Pet. 6) has no application here because compensation for delay is a necessary part of a "reasonable attorney's fee" (Br. in Opp. 6-9).

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[1]Respondents also contend that 42 U.S.C. 2000e-5(k) waives the government's sovereign immunity even as to explicit awards of interest (Br. in Opp. 4-5). This contention is addressed in our reply memorandum in *Shaw* v. *Library of Congress*, No. 85-54.

This argument, however, entirely fails to respond to our submission that the "no-interest rule," because grounded on the proposition that "delay or default cannot be attributed to the government" (*United States* v. *Sherman,* 98 U.S. 565, 568 (1878)), bars all claims against the United States that are related to the belated receipt of funds. See Pet. 7. Thus, even if respondents are correct in asserting that the use of current rates in private sector litigation may be characterized as part of a "reasonable fee,"[2] in the absence of an express waiver Congress cannot be deemed to have permitted the enhancement of a money judgment against the United States to compensate for delay in payment.

This is a familiar principle in litigation involving interest. While the term "just compensation" generally is understood to have an interest component (see *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48. 49 (1951)), for example, the Court repeatedly has held that statutes or contracts providing for the payment of "just compensation" do not authorize the award of interest against the United States. See, *e.g., ibid.; United States* v. *Goltra,* 312 U.S. 203, 207-211 (1941). Indeed, respondents' analysis would render the "no-interest rule" nugatory by permitting the delay component of any monetary award against the government to be characterized as a part of the damages rather than as interest.

2. Respondents also suggest that current rates are distinguishable from interest because they are not "add[ed]" to the fee; instead, they are used to "arrive at" a reasonable fee

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[2]The cases cited for this proposition by respondent (Br. in Opp. 8-9) state only that the use of current rates may be an acceptable method of adjusting the fee award for "inflation and interest." *Ramos* v. *Lamm,* 713 F.2d 546, 555 (10th Cir. 1983); *Johnson* v. *University of Alabama,* 706 F.2d 1205, 1210-1211 (11th Cir.), cert. denied, 464 U.S. 994 (1983).

(Br. in Opp. 10). This is so, they maintain, because an attorney embarking on litigation involving fee shifting might set a higher rate in anticipation of delayed payment, and that rate should be used in the calculation of the fee (Br. in Opp. 9-10). As we note in our petition (at 9-10), however, this analysis rests on a fiction. The rate used in calculation of the lodestar is chosen at the completion of the litigation. Any difference between the attorney's historic rate and his lodestar rate therefore represents a retrospective decision to compensate him for delay attributed to the United States—the precise result that is forbidden by the "no-interest rule."

In any event, respondents entirely fail to respond to the proposition (see Pet. 10) that "it is the *reason* why the fee is adjusted upward," rather than the method of adjustment, that is determinative for purposes of the "no-interest rule." *Shaw* v. *Library of Congress,* 747 F.2d 1469, 1474 n.41 (D.C. Cir. 1984) (emphasis in original), petition for cert. pending, No. 85-54. In short, they have offered no reason to believe that there is any relevant difference between an award of interest and the use of current rates.[3]

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be held for disposition in light of *Library of Congress* v. *Shaw,* No. 85-54; alternatively, the petition for a writ of certiorari should be granted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

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[3]In fact, as we note in our petition (at 7 n.6), use of current rates is a decidedly less rational method of compensating for delay in payment. Respondents do not address this point.